RECORD AND BRIEFS

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SUPREME COURT, U.S.

No. 16-499

IN THE

Supreme Court of the United States

JOSEPH JESNER et al.,

Petitioners,

v.

ARAB BANK, PLC,

Respondent.

On Writ of Certiorari
to the United States Court of Appeals
for the Second Circuit

REPLY BRIEF FOR PETITIONERS

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REPLY BRIEF FOR PETITIONERS

It is important to focus on what this case is about. It is not about whether Arab Bank might today be "a constructive partner in fighting terrorist financing," Resp. Br. 1. Instead, it is about what the Bank did between 12 and 22 years ago.

Neither the United States nor the Bank's friends in the world of finance comment here on those actions. But in 2005 the U.S. Government sanctioned the Bank for violating the Bank Secrecy Act and for money laundering that risked aiding terrorism. Petr. Br. 8. These transgressions were so serious that the Government "took the extraordinary step of effectively stripping [the Bank's New York branch] of its banking powers." Br. of Fin. Reg. Scholars and Former Gov't Officials 22. After more evidence was produced at a lengthy trial under the Antiterrorism Act, a jury found that the Bank had "knowingly provided" financial services to customers and others it knew were terrorists. *Linde v. Arab Bank, PLC*, 97 F. Supp. 3d 287, 298-99 (E.D.N.Y. 2015). All told, the Bank intentionally funneled millions of dollars through its New York branch to facilitate terrorism and to reward families of those who perpetrated suicide attacks on civilians. *See id.* at 304-05, 311; Pet. 6.

Nor is this appeal about whether the Bank's purported rehabilitation after this reprehensible conduct provides reason to dismiss this case on political grounds—or whether the misdeeds giving rise to petitioners' ATS claims are actionable under the statute. The Government has never asked for this litigation to be dismissed on diplomatic relations grounds. It has not even filed a Statement of Interest

in the case. The district court and Second Circuit rejected petitioners' claims "solely" on the ground that the ATS categorically prohibits suing a corporation for a violation of the law of nations. Pet. App. 27a-29a. Accordingly, the single issue before this Court is whether the ATS indeed categorically bars corporate liability.

It does not. The Bank hardly disputes that traditional principles of statutory interpretation signal that the ATS allows corporate liability. And nothing in the framework established in *Sosa v. Alvarez-Machain*, 542 U.S. 692 (2004), undercuts that signal. *Sosa* requires the presence of a "specific, universal, and obligatory" norm of conduct to support a claim for a violation of the law of nations. *Id.* at 732 (citation omitted). But the Bank is wrong that *Sosa*—or international law in general—deprives federal courts of the ability to fashion appropriate liability rules for violations of such norms. Consequently, the default domestic rule of corporate liability should apply here absent an exceptionally compelling reason to abandon it.

No such reason exists. Federal statutes creating tort actions for terrorist financing and innumerable other transgressions allow corporate liability. And the only two counterexamples the Bank offers are readily distinguishable: This Court's *Bivens* jurisprudence rests on the *absence* of a statute, and the Torture Victim Protection Act expressly limits its reach to "individual" wrongdoers for reasons not applicable here. General principles of international law and international treaties likewise reinforce the propriety of corporate liability under the ATS for violating international norms. Finally, any foreign relations issues a particular ATS lawsuit may pose

can be dealt with directly under doctrines based on international comity; such potential issues provide no warrant for a blanket ban on corporate liability. To the contrary, giving companies doing business in the United States a free pass with respect to the laws of nations would risk creating the very foreign relations tensions the ATS is designed to prevent. It would also send the perplexing message that juridical persons in this country may enjoy all of the benefits of incorporation without subjecting themselves to civilization's most basic norms.

This Court should reverse.

ARGUMENT

I. The ATS authorizes suits against corporate persons.

Kiobel v. Royal Dutch Petroleum Co., 133 S. Ct. 1659 (2013), instructs that an analysis of the ATS should begin—and largely turn on—"the text, history, and purposes" of the statute. *Id.* at 1665. Contrary to the Bank's contentions, those touchpoints all signal an acceptance of corporate liability.

A. Traditional principles of statutory interpretation foreclose categorically exempting corporations from ATS liability.

1. ***Text.*** Seldom nowadays does a litigant come to this Court and assert that the text of the governing statute is irrelevant. Yet that is Arab Bank's position. According to the Bank, the ATS's text has nothing to say about whether the statute allows corporate liability because the ATS "only *confers jurisdiction*; it does not create a cause of action." Resp. Br. 35.

The Bank is mistaken. In *Kiobel*, this Court noted that "the question of extraterritorial

application [is] a 'merits question,' not a question of jurisdiction." 133 S. Ct. at 1664 (citation omitted). The Court nonetheless began by analyzing the "text" of the ATS's jurisdictional grant and found it telling that "nothing in the text of the statute suggests that Congress intended causes of action recognized under it to have extraterritorial reach." *Id.* at 1665.

The ATS's text is equally informative regarding the question presented here. Just as courts presume that a statute does not apply extraterritorially absent a "clear indication" to the contrary, *Kiobel*, 133 S. Ct. at 1664 (quoting *Morrison v. Nat'l Austl. Bank, Ltd.*, 561 U.S. 247, 255 (2010)), it is a bedrock presumption, absent a clear indication to the contrary, that "tort" statutes allow corporate liability. Petr. Br. 18-20; U.S. Br. 10-11. What is more, when the First Congress meant for only certain types of parties to be able to sue or be sued, it knew how to say so. The text of the ATS *does* limit the scope of permissible plaintiffs, and another jurisdictional provision in the same 1789 enactment expressly limited that provision's reach to certain classes of defendants. Petr. Br. 20-21. The presumption in favor of corporate liability is, therefore, all but dispositive here.

2. ***History and purposes.*** The Bank tries to overcome the textual barrier to its position by advancing a purposive argument. Allowing corporations to be held liable under the ATS, the Bank maintains, might in certain circumstances generate "diplomatic friction." Resp. Br. 40. Yet "even the most formidable argument concerning the statute's purpose" cannot overcome "clarity . . . in the statute's text." *Nichols v. United States*, 136 S. Ct. 1113, 1119 (2016) (quoting *Kloeckner v. Solis*, 133 S. Ct. 596, 607 n.4 (2012)). In any event, the Bank's

three-pronged purposive argument founders even on its own terms.

a. The Bank first contends that accepting corporate liability under the ATS would sometimes enable plaintiffs impermissibly to sue corporations "as proxies to advance claims that challenge the actions of foreign governments and officials." Resp. Br. 41. But that is not happening here; no one suggests Jordan has done anything wrong. Nor, more generally, are the actions of foreign governments or officials inevitably involved in ATS lawsuits against juridical persons. *See, e.g.*, *Adhikari v. Kellogg Brown & Root, Inc.*, 845 F.3d 184 (5th Cir. 2017) (human trafficking), *pet'n for cert. filed*, No. 16-1461 (June 2, 2017); *Flomo v. Firestone Nat. Rubber Co.*, 643 F.3d 1013 (7th Cir. 2011) (child labor practices).

Accordingly, the potential problem the Bank imagines does not justify categorically exempting corporations from ATS liability. If the problem the Bank describes arises in any particular case, it can be dealt with there—by way of "case-specific deference to the political branches," *Sosa v. Alvarez-Machain*, 542 U.S. 692, 733 n.21 (2004), or some other doctrine. *See* Petr. Br. 53.[1]

b. The Bank similarly asserts that imposing corporate liability could have "profound foreign policy and international comity implications." Resp. Br. 42. Perhaps occasionally. But, again, the Bank offers no

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[1] The same is true with respect to the Bank's criticism of aiding and abetting liability under the ATS. Resp. Br. 40. The permissibility and scope of such liability are not before the Court. But whatever the answers to those questions may be, they are irrelevant to whether the ATS categorically excludes corporations from its reach.

reason why international comity doctrines cannot address such sporadic concerns directly.

Worse yet, for all the Bank's talk of "return[ing] the ATS to its roots," Resp. Br. 44, the Bank ignores that its proposed rule would immunize not only foreign corporations in the situations it describes but also *American* companies for violations of international law committed against aliens on *American* soil. For instance, construing the ATS to foreclose corporate liability would preclude "a civil suit brought by a foreign ambassador against a U.S. corporation for wrongs committed against the ambassador by the corporation's employees in the United States." First U.S. *Kiobel* Br. 14. A categorical bar would similarly immunize a corporation against liability for "piracy committed by the corporation's employees." *Id.* There is "no good reason" to restrict the ATS in this manner. *Id.* at 24.[2]

c. Nor can the Bank justify the categorical ban it seeks by complaining that ATS plaintiffs sometimes

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[2] The reference to businesses engaged in piracy is no mere academic concern. Some piracy operations have corporate attributes. Petr. Br. 31; *see also* The World Bank, *Pirate Trails: Tracking the Illicit Financial Flows from Pirate Activities off the Horn of Africa* 30-32 (2013), https:// tinyurl.com/lypg87m.

The fact that piracy was one of the three paradigmatic offenses that Congress had in mind when it passed the ATS, *see Sosa*, 542 U.S. at 720, also belies any claim that the ATS applies only when the United States could be held internationally responsible for harboring wrongdoers. The First Congress provided a civil remedy for victims of piracy not because other nations might go to war with the United States if it did not, but because pirates—like terrorists today—were considered "*hostis humani generis*, an enemy of all mankind." *Id.* at 732 (quoting *Filartiga v. Pena-Irala*, 630 F.2d 876, 890 (2d Cir. 1980)).

sue corporations instead of individual perpetrators from whom they may have more trouble collecting a judgment. Resp. Br. 41-42.

"[F]ew doctrines of the law are more firmly established or more in harmony with accepted notions of social policy than that of the liability of the principal without fault of his own." *Gleason v. Seaboard Air Line Ry. Co.*, 278 U.S. 349, 356 (1929) (citing *Farwell v. Boston & Worcester R.R. Corp.*, 45 Mass. (4 Met.) 49, 55 (1842)); *see also New Orleans, M., & C.R. Co. v. Hanning*, 82 U.S. (15 Wall.) 649, 657 (1873); Restatement (First) of Agency § 219(1) (1933); Petr. Br. 35-36. This rule is particularly important where a business's employees are "less able to satisfy a judgment for damages." *Kerl v. Dennis Rasmussen, Inc.*, 682 N.W.2d 328, 336 (Wis. 2004) (Sykes, J.); *see also* Alan O. Sykes, *The Economics of Vicarious Liability*, 93 Yale L.J. 1231, 1241-42, 1246-47 (1984).

These principles also apply with full force in the context of the law of nations. In one of this Court's earliest opinions on the subject, Justice Story explained that vessel owners were liable for the international tort of piracy, "without any regard whatsoever to the personal misconduct or responsibility of the owner," because that is typically "the only adequate means of . . . insuring an indemnity to the injured party." *The Malek Adhel*, 43 U.S. (2 How.) 210, 233 (1844); *see also* Petr. Br. 25-26; Br. of Admiralty Law Profs. 5-7; Br. of Profs. of Legal History 16-20. The same reasoning obviously applies to modern corporations.

And this is to say nothing of deterrence—the other "important purpose" of tort law. *Memphis Cmty. Sch. Dist. v. Stachura*, 477 U.S. 299, 307 (1986). Holding corporations liable for the acts of

their agents is often also "the only adequate means of suppressing the offence or wrong." *The Malek Adhel*, 43 U.S. (2 How.) at 233; *see also Owen v. City of Independence*, 445 U.S. 622, 652 n.36 (1980); Petr. Br. 26. A categorical bar on corporate liability would thwart that objective.

B. Nothing in *Sosa* shields corporations from ATS liability.

Unable to build an argument from first principles, the Bank seeks shelter in *Sosa v. Alvarez-Machain*, 542 U.S. 692 (2004). But neither of the Bank's contentions based on that opinion withstands scrutiny.

1. The corporate identity of an actor is irrelevant to whether a claim rests on a specific, universal, and obligatory norm of international law.

a. Relying on *Sosa*'s footnote 20, the Bank first asserts that "there is no specific, universal, and obligatory norm of imposing international-law obligations on corporations." Resp. Br. 22 (capitalization removed); *see also id.* at 21 (quoting *Sosa*, 542 U.S. at 732 n.20). But petitioners, the United States, and the country's leading international law scholars have already explained that this argument misapprehends the inquiry that footnote 20 requires. Footnote 20's directive to determine whether "international law extends the scope of liability for a violation of a given norm to the perpetrator being sued," *Sosa*, 542 U.S. at 732 n.20, goes to the substantive question whether a given norm requires state action. The footnote has nothing to do with remedial questions such as what liability

rules apply in ATS lawsuits. *See* Petr. Br. 28-30; U.S. Br. 19-21; Br. of Int'l Law Scholars 13-15.

The Bank offers no response. Accordingly, there can no longer be doubt that "[t]he proper question is not whether there is a general norm of corporate liability under customary international law, but whether the particular norms at issue [in this case] distinguish between natural and juridical persons." Br. of Int'l Law Scholars 11; *accord* U.S. Br. 18-19. And as the United States has repeatedly explained, there is *no* international law norm "that requires, or necessarily contemplates, a distinction between natural and juridical actors." First U.S. *Kiobel* Br. 20; *accord* U.S. Br. 13.

b. Falling back, the Bank contends that the specific norm against terrorism financing does not apply to any private actors at all. Resp. Br. 31. This Court need not address this argument to decide the question presented. Petitioners have advanced claims for genocide and crimes against humanity as well as a terrorism-financing claim. Petr. Br. 9. The Bank does not dispute that private actors can violate the former two norms.

At any rate, the terrorism-financing norm clearly *does* apply to corporations and other private actors—as even the defendant in *Kiobel* acknowledged. *See* Petr. Br. 33; *see also* Br. of Yale Law Sch. Ctr. for Glob. Legal Challenges 17-19. The Bank tries to build an argument to the contrary from the fact that the International Convention for the Suppression of the Financing of Terrorism imposes obligations "primarily on signatory states and leaves the scope of corporate responsibility to the signatory states." Resp. Br. 31. But to borrow the Bank's own words from three pages before: "That is not surprising

because international law is not principally about providing civil remedies, which is generally the office of domestic law." *Id.* at 28; *see also* Petr. Br. 32; Br. of Int'l Law Scholars 9-11. In other words, the important thing about the Financing Convention is that it embodies a substantive norm against any "legal entity" providing financial services to aid terrorism. Financing Convention art. 5, Dec. 9, 1999, 2178 U.N.T.S. 197. The scope of corporate liability for violating that norm is a matter of each nation's domestic law.

2. The corporate identity of an actor provides no basis for exempting it from liability as a matter of "residual common law discretion."

While *Sosa* does not demand the presence of a general norm of corporate liability under customary international law, it does afford federal courts "residual common law discretion" to ensure that causes of action under the ATS are legally sound and judicially administrable. 542 U.S. at 738. But none of the arguments the Bank raises in this respect provides any reason to deviate from the statute's presumptive acceptance of corporate liability. To the contrary, each of the guideposts relevant to this Court's common-law-making power confirms that corporate liability is appropriate here.

a. ***State common law.*** Petitioners explained in their opening brief that, when exercising common-law-making power, this Court often looks to how state common law deals with comparable issues. Petr. Br. 34-37. The Bank does not dispute that this inquiry points unambiguously here toward recognizing corporate liability. As the Brief of Procedural and

Corporate Law Professors elaborates, states recognize that, "as a matter of fundamental fairness and the effective maintenance of the corporate rule of law, corporations must be civilly liable for the unlawful employment-related behavior of corporate employees." *Id.* at 9; *see also* Br. of Interfaith Ctr. on Corp. Responsibility et al. 11-16.

b. ***Comparable legislation.*** Petitioners also have emphasized that "[f]ederal statutory causes of action"—including in the closely analogous contexts of the Antiterrorism Act and 42 U.S.C. § 1983—"almost always allow corporate liability." Petr. Br. 37. The Bank does not contest this either. Instead, it fastens onto two lone exceptions amid this ocean of legislative authority and argues that the exceptions should control. Resp. Br. 32-39. The Bank is incorrect.

This Court's *Bivens* jurisprudence offers no meaningful guidance here. The *Bivens* line of cases does not involve legislation at all, but rather a wholly judge-made cause of action. It is true, as the Bank notes, that Justice Scalia argued in *Sosa* that the ATS should be managed akin to the implied private right of action this Court created in *Bivens*. *See* Resp. Br. 38 (citing *Sosa*, 542 U.S. at 743 (Scalia, J., concurring in part and concurring in the judgment)). But the Bank neglects to acknowledge that the *Sosa* majority *rejected* Justice Scalia's view that the ATS gives rise to nothing more than an implied right of action. *See Sosa*, 542 U.S. at 728-31. The Court held—and this Court in *Kiobel* reaffirmed—that the ATS vests the federal courts with authority to grant relief for tort violations according to "federal common law." *Id.* at 732; *accord Kiobel*, 133 S. Ct. at 1663. That being so, the common law's default rule of corporate liability controls.

As the United States explains, the ATS's directive to mold causes of action according to the common law also distinguishes the ATS from the Torture Victim Protection Act (TVPA), 28 U.S.C. § 1350 note. *See* U.S. Br. 9-11. Try as it might, the Bank cannot escape the fact that Congress expressly limited the TVPA to "individual" defendants. *Mohamad v. Palestinian Auth.*, 566 U.S. 449, 460 (2012). Congress, moreover, did so for a reason inapplicable here: to ensure harmony with the Foreign Sovereign Immunities Act. Petr. Br. 42.

For over two hundred years, including when it enacted the TVPA, Congress has never seen fit to restrict the ATS to individual defendants. Lest there be any doubt, the congressional committees that oversaw the TVPA's adoption stressed that the ATS "should remain intact." S. Rep. No. 102-249, at 5 (1991); *accord* H.R. Rep. No. 102-367, at 4 (1991). The ATS thus continues after the TVPA to integrate the common law's acceptance of corporate liability.

c. ***International law***. Insofar as international law informs this Court's exercise of its residual common-law discretion, it further supports the availability of corporate liability under the ATS.

i. *General principles*. The Bank does not dispute that civilized countries around the world agree that corporations may be held liable in tort. *See* Resp. Br. 27. But the Bank argues this fact is "irrelevant" because "the ATS confers jurisdiction over actions alleging a 'violation of the law of nations,' not actions alleging violations of the domestic laws of foreign nations." *Id.*

The Bank is wrong. This Court has long held that "general principles"—that is, legal rules applied

domestically in countries across the world, Petr. Br. 43—"necessarily inform[]" federal common-law rules that implement causes of action for violations of international law. *First Nat'l City Bank v. Banco Para El Comercio Exterior de Cuba*, 462 U.S. 611, 623 (1983); *see also id.* at 628-29 n.20; *Pearcy v. Stranahan*, 205 U.S. 257, 270 (1907); *United States v. Smith*, 18 U.S. 153, 160-61 (1820). The Restatement (Third) of Foreign Relations Law likewise makes clear that "general principles common to the major legal systems, even if not incorporated or reflected in customary law or international agreement, may be invoked as supplementary rules of international law where appropriate." *Id.* at § 102(4). The Bank's response that "even domestic law prohibitions that are universal do not create an actionable international-law prohibition," Resp. Br. 27, mixes apples and oranges. The question here concerns rules for implementing a cause of action, not the content of the cause of action itself.

Even if, as the Bank would have it, the relevant inquiry were limited to rules governing claims for violations of international norms, it would not matter. "[C]ivil liability against corporations . . . for conduct constituting violations of international norms[] is imposed in jurisdictions around the world." Br. of Comparative Law Scholars 15; *see also id.* at 15-23 (conducting survey); Petr. Br. 43-44.

ii. *Treaties.* The Bank's effort to fend off the implications of international treaties fares no better. The Bank does not dispute that numerous treaties require signatories to prohibit corporations from violating customary international norms and to provide for liability against corporate violators, *see* Petr. Br. 44-45. But—echoing its argument regarding

the Financing Convention—the Bank says those agreements fail to support corporate liability here because they "do not impose international-law obligations *directly* on corporations." Resp. Br. 30 (emphasis added). Instead, they demand action from "*signatory states.*" *Id.*

This objection misunderstands how international law works. Of course treaties operate directly on only the parties that sign them. But that does not mean that the norms in these agreements apply only to signatory states. International law "establishes substantive standards of conduct but generally leaves each nation with substantial discretion as to the means of enforcement within its own jurisdiction." U.S. Br. 17-18. The pertinent question, therefore, is whether international treaties condemn "underlying *conduct*" that can be committed by corporations. *Id.* at 18. (They do.) It does not matter whether the treaties themselves specifically create causes of action against corporations.

The Bank, in fact, implicitly admits as much elsewhere in its brief. None of the post-Nuremberg treaties implementing human rights norms directly regulates individual conduct. Yet the Bank acknowledges that those norms apply "not merely [to] *states*, but also *individuals*." Resp. Br. 24 (citation omitted). So too with respect to corporations. As the U.N. Human Rights Council has recognized, customary international law—as reflected in modern treaties—establishes certain "universally applicable" norms that govern the conduct of "business enterprises" as much as any other private party. *See* Human Rights Council, *Rep. of the Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations*

and Other Business Enterprises, U.N. Doc. A/HRC/17/31, at 5-6 (Mar. 21, 2011).

iii. *International tribunals.* Like the Second Circuit, the Bank trumpets the fact that international tribunals from Nuremberg forward have limited their jurisdiction to natural persons. Resp. Br. 25-26. But petitioners, the United States, and international law experts have all explained that the reason for this limitation is that these tribunals have exercised only *criminal* jurisdiction, and imposing corporate criminal liability gives rise to challenges that civil liability does not. Petr. Br. 46-48; U.S. Br. 22-24; Br. of Int'l Law Scholars 17-23.

The Bank never directly responds to this explanation. The closest it comes is suggesting that the architects of the Nuremberg Tribunal and the International Criminal Court (ICC) considered giving the panels civil jurisdiction over corporations and concluded they lacked legal authority to do so. Resp. Br. 24, 28. These intimations are inaccurate. A comprehensive examination of the planning and proceedings at Nuremberg demonstrates that the Allies and the judges on the Tribunal "recognized, and indeed seemed to assume, that corporations can violate international law" and that "civil" remedies for such violations are permissible. Br. of Nuremberg Scholars 6; *see also id.* at 6-37. Even other historians whose views the Bank prefers, *see* Resp. Br. 25, have emphasized that "the fact that no corporate entities were in fact charged at Nuremberg" does not prove "that corporations and similar business entities could not be charged." *Kiobel* Br. of Nuremberg Historians and Int'l Lawyers 4.

The diplomat who led the U.S. delegation that negotiated the Rome Statute of the International

Criminal Court similarly explains that the Rome Treaty was designed exclusively "to create an international criminal court"; the negotiators "left civil damages for both natural and juridical persons out of the discussion." Br. of Ambassador David J. Scheffer 11. It is therefore "incorrect" to treat the resulting jurisdiction of the ICC as rejecting the concept of civil corporate liability. *Id.* at 12. Indeed, "if the negotiators in Rome had . . . overtly considered civil remedies and not an exclusively criminal process, a proposal for corporate civil liability consistent with the Alien Tort Statute might well have" carried the day. *Id.* at 13.

d. ***Foreign relations.*** The Bank's musings about diplomatic friction provide no warrant—either generally or in the specific context of this case—to categorically ban corporate liability under the ATS.

As a general matter, ATS lawsuits can be brought against domestic corporations for conduct committed in the United States. Such cases are hardly likely to raise any serious foreign relations concerns—unless, of course, our courts were to withhold remedies from deserving alien plaintiffs. And when plaintiffs sue a foreign corporation for actions taken partly abroad, Resp. Br. 42, the Bank does not dispute that other doctrines—including *forum non conveniens*, the presumption against extraterritoriality, and case-specific deference to the political branches, *see Sosa*, 542 U.S. at 733 n.21—are adequate to deal with any foreign relations concerns that may arise, *see* Petr. Br. 52-53. That is presumably why the State Department is supportive of corporate liability here, and why Congress has never seen fit to immunize corporations from ATS liability.

On a more specific level, the Bank is simply wrong that the "intricate lattice" of international "banking regulations," Resp. Br. 46, should somehow immunize financial corporations from ATS liability. Petitioners do not seek redress for the violation of any "banking regulations." Petitioners allege violations of the law of nations. And those kinds of violations are exactly what the ATS provides remedies for. The existence of detailed regulations covering myriad *lesser* forms of banking misconduct, therefore, has no more relevance here than the web of employment laws governing wages, hours, and occupational safety would have in an ATS lawsuit against a corporation for internationally trafficking in slave labor.

Nor is this a case, as the Bank would like, involving "a bad actor us[ing] a well-run bank to send a wire transfer in the course of committing his bad acts"—with the transfer just "happen[ing] to be denominated in U.S. dollars" and passing through this country "without human intervention." Resp. Br. 10, 46-47. As the district court has explained, "there is nothing 'routine' about the services the Bank is alleged to have provided." *Almog v. Arab Bank, PLC*, 471 F. Supp. 2d 257, 291 (E.D.N.Y. 2007). The Bank was not "a mere unknowing conduit for the unlawful acts of others, about whose aims the Bank [was] ignorant." *Id.* Instead, it intentionally transferred money through its New York branch with the expectation and purpose of providing material support for terrorist attacks. Pet. 6-8; *see also* Br. of Fin. Reg. Scholars and Former Gov't Officials 17-22.

If anything, corporate liability under the ATS is especially necessary in this particular context. "[M]ost terrorist funding" flows through corporations. Br. of Former U.S. Counterterrorism and Nat'l Sec.

Officials 3. And, as a wide collection of former national security and counterterrorism officials explain, "[g]overnment enforcement alone is not enough to stanch the flow of funds." *Id.* at 20. (Even here, federal agencies did not investigate the Bank until this litigation was underway.) Private lawsuits "[h]olding funders accountable" thus advance the vital foreign policy goals of reducing terrorist activity and making the world a safer place. *See* Br. of Senators Sheldon Whitehouse & Lindsey Graham 14; *see also id.* at 7-15.

II. This Court should remand for consideration of the Bank's arguments beyond the issue of corporate liability.

The district court dismissed petitioners' ATS claims solely on the ground that the ATS bars corporate liability. Pet. App. 6a-7a, 27a. The Second Circuit—accepting the Bank's lead argument on appeal, *see* Appellee's CA2 Br. 14-29—affirmed exclusively on that basis, without considering any of the Bank's back-up arguments. Pet. App. 29a. If this Court holds that the ATS permits corporate liability, longstanding practice dictates a remand to allow the Second Circuit to consider any properly presented arguments the Bank may wish to renew in support of the district court's order of dismissal. As this Court regularly admonishes, it is "a court of review, not of first view." *Skinner v. Switzer*, 562 U.S. 521, 537 (2011) (quoting *Cutter v. Wilkinson*, 544 U.S. 709, 718 n.7 (2005)).

The Bank nevertheless asks this Court to leapfrog the court of appeals (and, in some instances, the district court) and consider a potpourri of alternative grounds for affirmance. *See* Resp. Br. 51-

60. The Court should decline this request. As petitioners explained at the certiorari stage, some of the arguments the Bank now presses are not properly preserved. The rest, at the very least, are sharply contested and thus should be considered according to ordinary procedures of appellate review. *See* Cert. Reply 5-12; *see also, e.g.*, Br. of Yale Law Sch. Ctr. for Glob. Legal Challenges 15-17. If nothing else, it should be obvious that word limitations preclude full briefing of these issues.

The Bank contends that this Court may safely jettison its usual procedures because "[t]he United States essentially agrees with the Bank on the bottom-line conclusion that petitioners' claims must be dismissed." Resp. Br. 58. This assertion is misleading at best. The Government says that "*unwarranted* continuation of this case would be detrimental to the foreign-policy interests of the United States." U.S. Br. 7 (emphasis added). But the Government takes no position on whether the continuation of petitioners' claims is actually unwarranted. Instead, the Government simply urges this Court to direct the Second Circuit on remand to consider "*potentially* dispositive threshold issues" that are "properly before the court of appeals." *Id.* at 7, 32-33 (emphasis added).

Petitioners have no objection to the lower courts efficiently considering potentially threshold issues on remand. After this Court resolves the question presented, the Second Circuit may consider any properly preserved and ripe argument the Bank renews in support of the district court's order of dismissal. And, if necessary, the district court may expeditiously consider any argument that is better addressed as an initial matter at that level.

CONCLUSION

For the foregoing reasons, the judgment of the court of appeals should be reversed.

Respectfully submitted,

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